United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7655

To be argued by
HERBERT PRASHKER

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United States Court of Appeals

For the Second Circuit

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

against

CHARLES BEATY, WILLIAM R. BREEN, JOHN P. CARR, FRANKLIN D. DACK, DAVID LEWIS DAVIES, FRANK DAVIS, CHESTER LEE EDWARDS, OTTO F. FLEISCHMANN, ROBERT W. GAUGHAN, E. T. GREENE, LAWRENCE RAYMOND JESSE, KENNETH E. LENZ, EDWARD A. LEONHARD, A. C. LOOMIS, JR., VERNON C. MEYER, JAMES MILTON MILLER, MARSHALL EARL QUACKENBUSH, CHARLES V. TATE and CHARLES E. WOOLSEY,

Defendants-Appellants.

Appeal from an Order of the United States District Court for the Southern District of New York

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7655

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STATEMENT OF THE CASE

Defendants-appellants, nineteen former pilots of Trans World Airlines, Inc. ("TWA"), whose discharges for cause or resignation have been sustained under the Railway Labor Act grievance and adjustment procedures provided by their union contract, appeal from a judgment of the District Court (Cannella, J.) staying

arbitration of their claims for restoration to their former positions of Flight Engineer under the arbitration clause of individual agreements between TWA and each of the defendants (A-137).* Those individual agreements granted each of the defendants a "prior right" to a Flight Engineer position on TWA as against certain other employees, and provided for enforcement of such prior right by arbitration, but also provided that the individual agreements themselves terminated upon "voluntary resignation or discharge for cause." When the discharged pilots served demands for arbitration under §7503(c) of the New York Civil Practice Law and Rules ("CPLR") of their claims under their Individual Agreements, TWA brought this action to stay arbitration under CPLR §7503(b), invoking federal jurisdiction on federal question and diversity of citizenship grounds, and alleging that their

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*Designated portions of the Record on Appeal, reprinted in the Appendix, filed January 19, 1976, will be referenced as "A- ." The Opinion of the District Court, dated October 16, 1975, will be referenced as "Op. , A- "; the transcript of the trial before Judge Cannella on December 2, 1974 will be referenced as "Tr. , A- ."

The parties' stipulation to the District Court's jurisdiction and to the facts not in dispute in the proceedings below, contained in a Pre-Trial Order, entered November 19, 1974, will be referenced as "PTO ¶ , A- ."

Those portions of the parties' Joint Exhibits to the Pre-Trial Order designated by the defendants-appellants, and reprinted in the Appendix, will be referenced as "JX , A- ." Additional portions of the Joint Exhibits, designated by the plaintiff-appellee, and reprinted in the separate Exhibit Volume, will be referenced as "JX , E- ." Plaintiff-appellee's exhibits, reprinted in the Exhibit Volume, will be referenced as "PX , E- ."

Defendants' Brief on Appeal will be referenced as "D.Br."

discharges for cause terminated the agreements to arbitrate. TWA further argued that the issue of whether there had been "cause" for discharge was a question to be resolved under the Railway Labor Act, 45 U.S.C. §151 et seq.,(the "RLA" or the "Act") grievance and adjustment procedures of the applicable collective labor agreement. Since the discharges had been sustained as "for cause" under those procedures, and the individual agreements had terminated by virtue of the discharges, TWA urged that there was no longer an agreement to arbitrate, and no authority in an arbitrator to direct TWA to employ as Flight Engineers the men who had been properly discharged. The defendants, on the other hand, asserted that the question of whether they had been discharged "for cause," so as to terminate the arbitration agreement and their "prior rights" should be submitted to the arbitrator, and that failing that, the District Court should independently determine that there had not been "cause" for discharge.

Nearly all the facts were stipulated prior to trial (see PTO ¶¶1 to 30, A-14-28), the Pre-Trial Order providing that only one issue of fact was to be litigated--whether the representatives who negotiated the form of the individual agreements intended and understood that the determination as to whether there was "cause for discharge" was to be made in every case under the grievance and adjustment procedure of the applicable collective agreement or by an arbitrator pursuant to the individual agreement (PTO ¶12, A-28). Following the trial, the Court did not directly address itself to that issue of fact; it held that the question of whether there was a subsisting agreement to arbitrate was a question for the

Court (Op. 7, A-136g), that the agreement to arbitrate, by its terms, terminated upon discharge for cause. Without relying upon the determinations sustaining the propriety of the discharges made under the RLA grievance and adjustment procedures, the Court then made its own determination on the facts that there was "cause" for the discharges; that the arbitration agreements had accordingly terminated, and that the arbitration should be stayed.

On this appeal, the defendants argue principally that the questions of whether the defendants had been discharged for cause within the meaning of the individual agreements, and of whether such discharge terminated the obligation to arbitrate, were questions for the arbitrator, not for the Court; they argue further that if the question was for the Court, the Court erred in determining that the discharges terminated the agreement to arbitrate.

TWA contends that the Court properly determined that discharge for cause terminated the agreement to arbitrate, and that if the question of whether there was cause for discharge, was for the Court, that the Court properly determined it. But TWA urges, as an independent ground for affirmance, that the question of whether there was "cause" for discharge had been finally resolved against the defendants in the grievance and adjustment procedure under the RLA and the collective agreement, and that the Court need not have undertaken a de novo examination of whether there was "cause" for discharges. TWA further argues, as an independent ground for affirmance, that the defendants' demands for arbitration were barred by laches.

STATEMENT OF FACTS

By the terms of the Pre-Trial Order, the facts recited below are not in dispute, except where specifically indicated to the contrary.

Defendants' distortion of the stipulated facts requires that the facts be restated in some detail.

1. The Genesis of the Individual Agreements - The FEIA Crew Complement Agreement and Memorandum C - June, 1962

As of June 21, 1962, each of the nineteen defendants was employed as a Flight Engineer by TWA. On that day, a "Crew Complement Agreement" was executed by TWA and the Flight Engineers' International Association, TWA Chapter, which was then the certified bargaining representative for TWA's Flight Engineers (PTO ¶4, 7, A-15, 16; JX 2, E-20-26). The agreement settled a dispute over the qualifications and duties of the Flight Engineer members of the cockpit crew on jet aircraft which had occupied the attention of a special Presidential commission since a seven-airline strike had effectively crippled the nation's air transportation system in February, 1961 (PTO ¶6, A-16; JX 5, E-62). Under that agreement TWA Flight Engineers then employed or on furlough (collectively referred to as "Memorandum A and Al Engineers") including

each of the defendants, were

> "recognized as entitled at all future times and until retirement or discharge for cause to priority rights to all Flight Engineer positions required by the Company's operations, as detailed and implemented in attached Memorandum C." (JX 2, ¶1-f, E-20, emphasis added.)

Memorandum C to the Crew Complement Agreement (1) confirmed TWA's obligation to offer to all A and A1 Flight Engineers "until their retirement, voluntary resignation or discharge for cause" a "prior right," as against flight crew members other than Flight Engineers (i.e., Pilots), to bid for and occupy all Flight Engineer positions required by the Company's operations, and (2) obligated TWA to enter into an individual agreement to that effect with each A and A1 Flight Engineer (JX 2, E-26). During the negotiations of the Crew Complement Agreement and Memorandum C there was no discussion of the meaning of the phrase "discharge for cause" used in those agreements (PTO ¶9, A-17, 18). The requirement that individual agreements be executed with each individual Engineer stemmed from the Engineers' concern that FEIA might be replaced as the representative of the Flight Engineers by an organization other than FEIA, namely the Air Line Pilots Association International ("ALPA") and that ALPA, as collective bargaining representative, might prefer to eliminate the "prior right" provisions in future collective agreements (PTO ¶8, A-17; Tr. 49, A-114; D.Br. 7).

Memorandum C contained no provision for the inclusion of an arbitration clause in the individual agreements (JX 2, E-26).

and the suggestion that an arbitration clause be included came, in the course of drafting the individual agreement, from the FEIA, through its counsel, Asher Schwartz, Esq. (Tr. 13, A-78).

2. The established procedures for resolving disputes with respect to discharges

At the time FEIA and TWA negotiated and entered into the Crew Complement Agreement, the collective bargaining agreement between them provided for the processing of any Flight Engineer "grievance concerning any action of the Company affecting them," including, of course, grievances relating to discharge for cause (PTO ¶10, A-18; JX 1, §XIX, E-6). The System Board of Adjustment established by the agreement, as required by Section 204 of the RLA, had jurisdiction over any unresolved disputes between "any employee and/or employees and the Company growing out of dismissals of employees. . .and grievances or out of the interpretation or application of any provisions of the Agreement." (JX 1, §XX, E-6, 7.)

3. The drafting of the Individual Agreements - July and August 1962

In July, 1962, Asher Schwartz and Jesse Freidin, the attorneys who had represented FEIA and TWA in the Crew Complement negotiations, were delegated the task of drafting the individual

agreements provided for in Memorandum C (PX 1, E-22; PX 2, E-228).

Some time in August 1962 agreement was reached as to the form of the individual agreements, including an arbitration provision, which declared among other things that the agreement would terminate on the retirement, voluntary resignation or discharge for cause of the signatory Flight Engineer (PTO ¶8, A-17).

In its agreed upon form, and as subsequently signed without change by each of the defendants (PTO ¶12, A-18, 19; JX 7, A-49-52), Article I of the individual agreement spelled out the prior right to bid for the Flight Engineer seat that had been agreed upon in Memorandum C.

> "1. So long as the Company includes, or is required by law or federal regulation to include more than two airmen, and one or more of such airmen is assigned to perform the flight engineering function . . . , the Company agrees that it will offer to Flight Engineers the prior right as against flight crew members other than flight engineers to bid for and occupy any flight engineer position required by the Company's operations and those of its successors or assigns." (JX 7, A-49).

Article 2 stated (1) the events that the agreement would survive, i.e. the termination of the current and future collective bargaining agreements between TWA and FEIA or its successors, and the furlough and recall of the signatory employee

and (2) the events that it would not survive, i.e., the signatory employee's retirement, voluntary resignation or discharge for cause.

It provided that

> "2. This Agreement shall survive the expiration of the current and any future collective bargaining agreement between the Company and the Association, or their successors or assigns, or any other duly designated or recognized representative of its employees who perform the flight engineering function, and shall continue in full force and effect until Flight Engineer's retirement, voluntary resignation or discharge for cause, and shall survive the re-employment on recall under the basic working agreement should Flight Engineer be furloughed because of no available flight engineer vacancy to which his seniority entitles him to bid." (JX 7, A-50, emphasis added.)

Article 5 of the agreement contained a limited arbitration provision, not required by the terms of Memorandum C, which reads as follows:

It provides that:

> "5. In the event that the Company threatens to sign any agreement or to take any action which denies or will, immediately or in the future, directly result in the denial of Flight Engineer's prior right to bid for and occupy the flight engineer's position, as provided herein and in the aforesaid Agreement of June 21, 1962, or which modifies, varies from or is inconsistent therewith, or if the Company has signed such an

> agreement or has taken such action, Flight Engineer shall have the right to assert his objection to the Company by notice in writing by registered mail or by telegram. The Company shall reply to said objection within four (4) calendar days by registered mail or telegram. If Flight Engineer deems said reply to be unsatisfactory, he may within four (4) calendar days submit his said objection to _____ _____ as arbitrator. The said arbitrator shall immediately communicate with the Company and Flight Engineer for the purpose of inquiring as to the nature and merit of Flight Engineer's objection. If, following such inquiry, the arbitrator believes that in order to preserve Flight Engineer's right as herein defined it is necessary to direct the Company to refrain from taking the action objected to pending a full hearing on Flight Engineer's objection, he shall have full authority to do so. The Arbitrator shall in any event schedule a hearing on Flight Engineer's objection within four (4) calendar days following receipt thereof, and shall render his decision thereon not later than four (4) calendar days thereafter (PX 2, Attachment, E-230-31).

After agreement had been reached on the form of the agreement, and prior to its signature by TWA and the individual Flight Engineers, Professor Nathan Feinsinger was designated as the permanent Arbitrator under the individual agreements (JX 7, A-50; Tr. 61, A-126).

4. The Extrinsic Evidence as to TWA's and FEIA's Intent and Understanding with Respect to the Authority to Determine whether There Was "Cause" for Discharge to which the Parties Did Not Stipulate

a. The Testimony of the Negotiators

TWA took the position in the proceedings below that no extrinsic evidence was needed to establish that the individual agreement, including the provision for arbitration, terminated on the signatory employee's "discharge for cause". But evidence was offered for the factual issue stipulated by the pre-trial Order as the one to be tried - the intent and understanding of the parties in negotiating and entering into Memorandum C and the Individual Agreements as to whether the System Board of Adjustment or the Arbitrator was to decide whether an employee had been "discharged for cause" so as to terminate the individual agreements.

The individual Engineers, of course, were not parties to Memorandum C: it was negotiated on their behalf by FEIA, which then represented only A and A1 Flight Engineers (PTO ¶7, A-16). The Individual Agreements were also negotiated on behalf of the Flight Engineers by FEIA, and each Agreement, as signed by TWA and by the individual Flight Engineer was consented to and counter-signed by Harrison Deitrich, President of the TWA-FEIA Chapter, FEIA's chief negotiator in the Crew Complement negotiations (Tr.24, A-89) and himself a Memorandum A Flight Engineer (JX 7, A-52).

The parties have stipulated that as in the case of Memorandum C, FEIA and TWA did not discuss the meaning of the term "discharge for cause" during the negotiation of the form of the individual agreement. (PTO ¶9, A-17, 18.) There is, thus, no evidence that they intended that disputes over whether particular discharges were for cause within the meaning of the individual agreement would be subject to determination by the individual arbitrator, as distinguished from the statutory System Board designated to determine disputes over whether there was cause for discharge (PTO ¶10, A-18). TWA offered evidence, in the form of testimony by David Crombie, TWA Vice President for Industrial Relations, and the chief negotiator for TWA (Tr. 12, A-77), and by Harrison Deitrich, the former President of FEIA, that neither one intended or understood that the individual agreement would affect or diminish the traditional jurisdiction of the System Adjustment Board to determine disputes over discharge for cause.*

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* The statements as to the individually held understandings of the negotiators were accepted into the record by the Court, with the reservation that their admissibility under the parol evidence rule would be determined at the close of the proceedings (Tr. 16, 28, A-81, 93). The Court later found that the individual agreement unambiguously provided that all of its provisions, including its arbitration provision, would terminate upon discharge for cause (Op. 10, 11, A-136k) and made no ruling as to the admissibility of the proffered testimony as to intent. (~~footnote continued on next page~~)

Crombie testified that he understood that a grievance challenging the discharge of an A or Al Flight Engineer was to continue to be processed through the grievance procedure under the applicable working agreement, including the System Board as the final forum for appeal, and was not to be submitted to the arbitrator designated by the individual agreement.*

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*Crombie testified as follows:

> "Q. During the period of the negotiation as to the form of the individual agreement, was there any discussion, to the best of your recollection, as to whether or not the question of whether there was just cause for the discharge of a flight engineer covered by the individual agreement was a question to be submitted and determined by the System Board of Adjustment under the applicable working agreement or to the arbitrator to be designated under the individual agreement?
>
> * * * *
>
> A. There was none between Mr. Freidin and me, and my recollection is that he did not report to me any discussion on that question between him and Mr. Schwartz.
>
> Q. During this period did you have any understanding as to what form [sic] would be the appropriate form [sic] for the determination of the question of whether there is just cause of discharge of a flight engineer covered by the individual agreement?
>
> A. If by understanding you mean did I have an understanding with a person with whom I was negotiating on the other side, the answer is, I had no such understanding.
>
> If by understanding you mean, what was my view throughout this period as to the adjudication of individual disputes, I never had any other view than but these disputes would be adjudicated through the system board proceedings in the applicable labor agreement which covered the activities of the person who was involved.
>
> Q. Do I understand, then, Mr. Crombie, that when you agreed to the form of the individual agreement in August of 1962, that you understood and intended
>
> (cont'd on next page)

Deitrich stated that it was his understanding and intent that the creation of the special arbitration procedure in the individual agreements would not diminish the existing jurisdiction of the System Board to consider and determine all grievances arising out of Flight Engineer discharges for cause.*

(cont'd from page 12a)

> that the arbitrator named in the individual agreement would not determine whether there was just cause for discharge of an engineer covered by that agreement?
>
> A. That's correct." (Tr. 14,16,17, A-79, 81, 82.)

*Deitrich had testified as to his understanding and intent at a System Board hearing on the discharge grievances of nine of the defendants. That testimony was offered into evidence in these proceedings pursuant to the parties' stipulation that it could be treated as deposition evidence. (PTO ¶XI, A-36.) Deitrich's testimony, as read into the record, was as follows.

> "Q. Was it your understanding at that time you negotiated the individual agreements, that your Flight Engineers' System Board of Adjustment would continue to hear and determine dismissal grievances for just cause?
>
> A. . . . It was assumed, I think, by all the parties that the System Board of Adjustment was provided for in the agreement, the basic agreement, would hear the items and hear all matters that it had heard previously.
>
> Q. Including dismissals for cause?"
>
> MR. SCHWARTZ: "Same Objection, Your Honor."
>
> MR. PRASHKER: "A. Yes, sir."
>
> (Tr. 27, 28, A-92, 93.)

b. A Broad Arbitration Clause - Proposed but not Accepted

In further support of its position that the parties never intended, and certainly never agreed, to give to the individual arbitrator authority to make determinations as to whether there was cause for individual discharges, or to diminish the existing authority of the System Board in that respect, TWA offered into evidence FEIA's draft of the individual agreement, dated July 11, 1962, with an unsigned copy of a covering letter from Schwartz to Crombie.

That draft proposed a far broader arbitration provision than the one ultimately adopted as follows:

> "5. In the event any dispute arises relating to the application or interpretation of the terms of this Agreement as they affect Engineer such dispute shall be submitted for disposition or settlement to an arbitrator selected by the Engineer and the Company in accordance with the rules of the American Arbitration Association, or if the Engineer elects to do so, to the System Board of Adjustment under the then existing collective bargaining agreement. (PX 1, E-224, 225.)

Crombie testified that he had received the original of the covering letter and the draft agreement on or about July 11, 1962, but did not recall whether he had received it by hand or whether the covering letter had been signed.*

5. The ALPA Crew Complement Agreement - September 1962

On September 25, 1962, shortly after agreement had been reached on the terms of the individual agreement, TWA and ALPA entered into the ALPA Crew Complement Agreement (JX 8, E-64-66). That agreement permitted the operation of jet aircraft with flight

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* Defendants' counsel objected to the draft's admission in evidence, and the Court reserved decision, stating that it would rule as to the admissibility of the draft "before the case is over" (Tr. 1 , A-76). Having decided the case without reference to extrinsic evidence of the parties' intent or the history of negotiations, the Court again made no ruling on the reserved issues of admissibility, see ~~supra~~ infra, p. 49.

deck crews consisting of two pilots and one Flight Engineer (with limited pilot-qualifications) in lieu of the three Pilot-one Flight Engineer crew previously required (PTO ¶11, A-18; JX 8, ¶A, C; E-64, 65).*

Setting the stage for defendants' decision to upgrade some A and A1 Flight Engineers to Pilot, the ALPA Crew Complement Agreement provided that all A or A1 Flight Engineers would be placed on the Pilots' System Seniority list below all then-employed Pilots, but above all Pilots hired thereafter. The Agreement further provided that TWA could, in its discretion, accept bids for pilot positions from A and A1 Flight Engineers who had been trained and had qualified for such pilot positions.

6. A New TWA-FEIA Working Agreement - November 1962

On November 21, 1962, TWA and FEIA entered into a new working agreement, which carried forward with no material changes the procedures for System Board determination of disputes over discharges for cause (JX 2, ¶¶XIX, E-15-18; PTO ¶10, A-18), and confirmed the continuing validity and precedence of the June 21,

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* The ALPA Crew Complement Agreement recognized "the job and bid priorities" of the Memorandum A Flight Engineers to the Flight Engineer position, as provided by Memorandum C of the FEIA Crew Complement Agreement (JX 8 ¶C, E-64, 65) and provided that the provisions of the TWA-ALPA Memorandum recognizing the prior bidding rights of the Memorandum A and A1 Flight Engineers would continue in effect beyond the term of the TWA-ALPA working agreement (JX 8, ¶M, E-67).

1962 Crew Complement Agreement (JX 2, ¶XXIII, E-12). A separate agreement, also dated November 21, 1962, provided that "if any dispute shall arise in connection with the construction, interpretation, application or performance" of the June 21, 1962 Crew Complement Agreement, the dispute would be referred immediately to a System Board of Adjustment that included a neutral member, permanently designated by TWA and FEIA to hear such disputes. (JX 2, pp. 126-127, E-31, Tr. 67, A-132.)*

7. The Defendants Sign the Individual Agreements, Giving Them "Prior Rights" to Engineer Positions - 1967

Between April and October, 1963, each of the defendants signed an individual agreement. Each thereafter completed the limited pilot training that had been agreed upon to qualify him to occupy the Flight Engineer position as part of a three-man jet crew (PTO ¶12, A-18, 19).

8. The Defendants Elect to Become Pilots - 1966-1967

During 1966, TWA exercised its discretion under the Crew Complement Agreement (see above, p. 15), to accept bids from A and A1 Flight Engineers for Pilot positions. During 1966 and 1967, each of the defendants voluntarily applied for and was assigned to Pilot First Officer training at TWA's expense, successfully completed that training, and was assigned as a Pilot First Officer

* System Board procedures normally provide for an equal number of company and union designees, and for the appointment of a neutral only in the event of a deadlock (JX 2, ¶XX(I), E-17).

under the applicable TWA-ALPA collective bargaining agreement (PTO ¶13, A-19). For periods ranging from three to four years, and until the discharges which inaugurated the current disputes, each of them continued to be employed as TWA Pilot First Officers. In accordance with the ALPA Crew Complement Agreement and the FEIA-TWA working agreement, each of the defendants, operating as Pilots, continued to appear on the separate Flight Engineer seniority list (so long as there was one), as well as on the Pilot seniority list (PTO ¶12, A-18, 19).

9. ALPA Becomes the Certified Representative for TWA's Pilots and Flight Engineers - A New Working Agreement is Signed - 1968

In 1968, after an election among TWA's Flight Engineers, ALPA was certified as their collective bargaining representative. On May 18, 1969, TWA and ALPA executed a single collective bargaining agreement covering TWA's Pilots (Captains and First Officers) and Flight Engineers (PTO ¶15, A-20; JX 9, E-68-85); thereafter the names of TWA's Pilots and Flight Engineers appeared on a single seniority list (PTO ¶15, A-20).* The last separate TWA Flight Engineers' system seniority list was published in January 1968.

10. TWA Policy Known to the Defendants Before They Became Pilots - Pilots Who Fail Captain Training are Discharged

Like its predecessors (JX 17, E-174), the 1968 TWA-ALPA Agreement provided (JX 9, ¶6(B)(I)(1), E-78) that:

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* By Section 27 of the working agreement, TWA and ALPA once again recognized and provided for the continuation of the prior rights of the A and A1 Engineers to bid for the Flight Engineer position (JX 9, E-86, 118).

"when a pilot fails to qualify as captain in his proper turn . . . his case shall be handled as the circumstances indicate, subject to Section 21."*

Under the provisions of that Section, TWA had never allowed a Pilot to remain in its employ for the purpose of serving as a flight deck crew member after he had failed to successfully upgrade from Pilot First Officer to Captain. All such Pilots had been discharged or allowed to resign, and during the period 1965-1972, at least 60 TWA Pilots were terminated under that policy; in reviewing such cases, the TWA Pilots System Board uniformly decided that a TWA Pilot First Officer who failed satisfactorily to complete Captain training after having been given a fair and adequate opportunity to do so was properly discharged for cause (PTO ¶19, A-21; Op. 5, A-136e).

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* Section 21, the contractual grievance procedure, provided, as required by Section 204 of the RLA, for the processing of grievances, including grievances involving the discharge for cause of any covered employee (~~which then included both Pilots and Flight Engineers~~ serving as a pilot) to the TWA Pilots System Board of Adjustment (JX 9, E-80-84).

Those procedures provided that a covered employee may not be disciplined or discharged without a written notification of charges preferred against him; that he has a right to request an investigation and hearing before an ~~junior~~ operating official of the Company; that the Company must furnish the employee and his representative with a written copy of the decision after hearing, ~~and that if dissatisfied, the employee may request an appeal hearing before a senior operating official of the company.~~ If a decision of the Company is not appealed by an employee within the time limits established by the agreement, the decision becomes final and binding. At the employee's option, a grievance may culminate in a formal hearing before a four man System Board, consisting of two designees of the Company and two Union designees. In the event of a deadlock a fifth neutral member is selected. The decision of a majority of the four or five man System Board is final and binding (JX 9, ~~6, 7~~. E-80-84

On August 12, 1968, Woolsey, the first of the defendants to do so, entered Captain training. The others followed over the next 20 months. It is conceded that "[a]t the time each defendant voluntarily bid for and was assigned to training and then to a position as TWA Pilot First Officer, and at the time each defendant voluntarily accepted assignment to training for upgrading from TWA Pilot First Officer to TWA Captain, he was aware that TWA intended to discharge him (and not to permit him to return to his former Flight Engineer position) if he entered Captain training and failed to complete it satisfactorily" (PTO ¶18, A-20, 21, emphasis added).*

11. None of the Defendants Object to TWA's "Up or Out" Policy - They Fail Captain Training and are Discharged for Cause

None of the defendants made any objection prior to voluntary entry into First Officer or Captain training, or while in Captain training, to TWA's announced policy and its clearly

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* As noted in the decision of the System Board sustaining the discharge of the defendants, forty other A and A1 Engineers who had qualified as First Officer thereafter voluntarily returned to Flight Engineer positions, twenty-three doing so rather than enter the Captain training program (JX 17, E-186).

An earlier System Board award recites that TWA was pessimistic about defendant Edwards' ability to complete Captain training and unsuccessfully attempted to dissuade him from entering training and assuming the attendant risk of discharge (JX 17, E-188). The 1968 TWA-ALPA contract provided that a First Officer with twelve years of flight deck crew seniority (which Edwards enjoyed) would receive 67.1% of the total pay of a twelve-year Captain; a twelve-year Flight Engineer would receive 60.3% of the total pay of a twelve-year Captain (JX 9, ¶4(A), 4(B), E-74, 75). The increase in pay had Edwards succeeded in upgrading to Captain would have been substantial

implemented intention to discharge an unsuccessful Captain-trainee, and not permit him to return to an Engineer position. None made any request for arbitration under his individual agreement of their present claim that TWA's announced policy threatened prior rights to an Engineer position under that agreement.* Each of the defendants failed to complete Captain training, and with the exception of defendant Carr, who resigned, was discharged for cause--as he knew he would be (PTO ¶18, A-21, 22). The first of the discharges occurred on June 3, 1969; the other ~~seventeen~~ twelve discharges (and one resignation) had been effected by ~~March 2~~ the end of, 1970 (PTO ¶20, A-22).

12. Most of the Defendants Appeal to the System Board

After their discharges, fifteen of the eighteen defendants promptly appealed those discharges to the System Board of Adjustment provided for by the ALPA contract (PTO ¶22, A-23, 24).** Nine of them claimed before the System Board that even if they had been properly discharged as Pilots, they nevertheless had a right to return to Flight Engineer positions. On this issue, ALPA opposed their claim, and they were represented by the separate counsel who represents them in this proceeding. (PTO ¶27, A-26). Their claims for return to their earlier Flight Engineer position,

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* The arbitration provision of the individual agreement, which required a determination by the arbitrator within 16 days of the filing of any objection by a Flight Engineer, also authorized the Arbitrator to direct the Company to refrain from taking the action objected to pending his determination.

* In respect of the grievances of five of the defendants the System Board deadlocked on whether they had received an adequate opportunity to complete training, the ALPA representatives supporting the grievants. Their grievances were then denied by the vote of the neutral referee (PTO ¶23, A-24).

were based inter alia on the FEIA Crew Complement Agreement, Memorandum C, the ALPA Crew Complement Agreement, and the November 21, 1962 Letter of Agreement with respect to disputes arising out of the FEIA Crew Complement Agreement (JX 17, E-171-173).

13. The Defendants Demand Arbitration; TWA Seeks a Stay and Defendants Seek to Enjoin their Own Appeals to the System Board

In June 1971, over a year after the last of the nineteen defendants had been discharged, and some four-to-five years after all of the defendants had been aware of TWA's intention to discharge any of them who accepted and then failed Captain training, and while the claims of nine of the defendants for restoration to their earlier Engineer positions were pending before the System Board, seventeen of the defendants wrote to TWA requesting arbitration, under the individual agreements, of a claimed right to return to their earlier Flight Engineer position. (JX 13, E-146-162). This was the first notice to TWA that any of the defendants claimed that TWA had violated his individual agreement or requested arbitration under that agreement (PTO ¶24, A-24). By notices dated July 22, 1971, and served upon TWA on July 30, 1971, pursuant to CPLR Section 7503(c), the defendants then announced their intention to arbitrate, under their individual agreements, their claims that TWA had violated those agreements by denying them a "prior right" to bid for and occupy positions as TWA Flight Engineers following their failure to satisfactorily

complete Captain training (PTO ¶25, A-25).*

TWA, relying upon diversity of citizenship (PTO ¶¶1, 2, A-14), and the existence of a federal question under the RLA, brought an action in federal court on August 9, 1971, seeking to enjoin the requested arbitrations,** alleging that there was no subsisting agreement to arbitrate in view of the termination of the individual agreements as a result of the discharge of the defendants for cause. Defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted was denied (per Cooper, J. on February 15, 1972), upon a ruling that "the duty to arbitrate and its extent are questions for the Court to decide on the basis of the contracts entered into by the parties." 80 L.R.R.M. 2353, 2354. Defendants then applied, on January 31, 1972, for a preliminary injunction to restrain the System Board of Adjustment from hearing and determining the pending appeals, which they themselves had

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* Each notice contained the following statement, as required by CPLR 7503(c):

> "PLEASE TAKE FURTHER NOTICE that unless within ten days after service of this notice of intention to arbitrate you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or had not been complied with and from asserting in court the bar of a limitation of time."

** The parties agree and the Court below found that this is a proceeding arising under the Railway Labor Act and under the New York Civil Practice Law and Rules Sections 7502, 7503, and that the Court had jurisdiction of the action under 28 U.S.C. §§1331, 1332, 1337, 2201, and 2202. (PTO ¶(1), A-14, Op 2, A-136b.)

previously filed.* The District Court (per Tenney, J.) denied the application on March 21, 1972, finding, among other things, that "defendants have failed to demonstrate. . .likelihood of success on the merits of their contention that the individual claims should be arbitrated." 80 L.R.R.M. 2354, 2355.

14. The System Board Decision - September, 1972

On March 23, 1972, it was stipulated that the issue of the grievants' rights to return to the Flight Engineer position, after failing Cap ain training, would be considered on a consolidated basis by a five-man System Board of Adjustment, with a neutral referee jointly selected by TWA, ALPA and the grievants.

On March 2, 1973, after nine days of evidential hearings, a hearing transcript of 1,429 pages, and after extensive written briefs and reply briefs, the System Board sustained the discharges. It held that a TWA Pilot Officer, who entered and failed to successfully complete Captain training, was properly discharged for cause as a TWA employee, and that an A and Al Flight Engineer who

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* At that juncture they claimed that their right to serve as TWA Flight Engineers should be determined by the arbitrator designated by their individual agreements, and not by the Board of Adjustment, pursuant to the working agreements, despite the fact that they themselves had invoked the System Board's jurisdiction (Affidavit of Asher Schwartz, Esq., attorney for defendants, sworn to January 31, 1972, p. 4, submitted with the motion for preliminary injunction).

had become a Pilot, who had then voluntarily entered Captain training with the knowledge that he risked discharge if he failed to complete Captain training had no residual right to bid for and occupy a Flight Engineer position when he failed (JX 17, E-~~48, 49~~ 211, 218).* With that determination, the statutorily mandated and collectively bargained procedures for challenging a discharge for cause had been exhausted. Twenty-one months later, on December 2, 1974, this action to determine the defendants' right to arbitrate the same issues involved in the System Board case came on for trial in the District Court. The District Court found as had the System Board, that the defendants had been discharged for cause and that the discharge had ended any right to arbitration under the individual agreement (Op. 10, 12, A-136j, l).**

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*With the exception of Meyer and Leonhard, who were returned to Captain training, all of the grievances based on inadequate opportunity were denied. Meyer again failed Captain training, and Leonhard was discharged for failure to return from medical leave (PTO ¶29, A-26).

**The Court found that Carr, who had voluntarily resigned was in the same position as the defendants who had been discharged and failed to grieve. (Op 14, n2, A-136n).

ARGUMENT

I

THE APPLICABLE PRINCIPLES OF CONTRACT CONSTRUCTION ARE NOT THOSE FAVORING ARBITRABILITY UNDER COLLECTIVE AGREEMENTS

In urging a construction of the individual agreement which would make the obligation to arbitrate under those agreements survive discharge, the defendants cite the cases creating principles of contract construction of arbitration clauses in collective agreements which favor arbitrability, e.g., Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) and United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). These cases reflect a national policy in favor of resolving disputes under such collective agreements by referring them to arbitration procedures established under these agreements to avoid industrial strife, see, e.g., Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 377-378 (1974).

The defendants' reliance on those cases here is misplaced and ironic: the forum provided by the Railway Labor Act and the collective bargaining agreement for the final adjudication of these claims--the System Board of Adjustment--(see, e.g., Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 322 (1972); International Ass'n of Machinists v. Central Airlines, Inc.,

372 U.S. 682 (1963); Reed v. National Air Lines, Inc. 524 F. 2d 456, 459 (5th Cir., December 8, 1975); Dorsey v. Chesapeake & Ohio R.R., 476 F. 2d 243 (4th Cir. 1973) has already adjudicated the issue against the defendants. Indeed, the central purpose of the defendants' demand for arbitration under their individual agreements is to avoid and circumvent the authority of that very tribunal by obtaining arbitrators' awards under the individual agreements directing TWA to employ the defendants as Flight Engineers notwithstanding that the System Board has found them to have been properly discharged. The cases cited by the defendants, and the labor relations policies which underly them, create no presumption of arbitrability in favor of an arbitrator under an individual agreement, particularly where his authority is invoked to limit the final authority of the statutory board in whose favor the presumption does run.

The unique agreements under which defendants seek to arbitrate their claims that they were improperly denied a right to bid for Flight Engineer positions are individual agreements, entered in between a carrier and some of its employees, contracting as individuals. The principles controlling this case, we submit, are those generally applicable to private arbitration, not the special principles developed for arbitration under collective agreements for policy reasons inappropriate here. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960). Unquestionably, the defendants had the right to a determination by the statutory and collectively established

forum--the Board of Adjustment--as to their rights to return to a Flight Engineer position after their discharge for cause as Pilots. Some of the defendants exercised that right, albeit unsuccessfully, and the others waived it by failure to exercise it. In each case, their respective discharges have become final and binding. Their rights under the individual agreement were the rights guaranteed by the language of that agreement, to the extent and for the period provided--that is, until discharge for cause--unembellished by any presumptions of arbitrability developed in support of collectively bargained procedures.

II

NO AGREEMENT TO ARBITRATE EXISTS

This Court's consideration of the correctness of the decision below must begin with the universally accepted premise that there is no duty to arbitrate in the absence of a valid, existing agreement to arbitrate the dispute as to which arbitration is sought. See, e.g., Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 374 (1974); International Union of Operating Engrs, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-92 (1972); Local 81, American Federation of Technical Engineers v. Western Electric Co., 508 F.2d 106 (7th Cir. 1974); International Union of Electrical Radio and Machine Workers v. General Electric Co., 407 F.2d 253, 260 (2d Cir. 1968) cert. denied, 395 U.S. 904 (1969); Procter & Gamble Independent Union of Port Ivory v. Procter & Gamble Mfg. Co., 312 F.2d 181, 184 (2d Cir. 1962) cert. denied, 374 U.S. 830 (1963).* Whether or not an agreement exists is a matter for determination by the courts,

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* The necessity for a valid existing agreement to arbitrate is clearly recognized under New York law, see, e.g., In re Kramer & Uchitelle, Inc., 288 N.Y. 467, 43 N.E. 2d 493, (1942), which, by agreement of the parties, governs the individual contracts pursuant to which defendants have demanded arbitration, and under federal law, to which the New York courts must look for guidance in a case arising out of federally regulated labor relations, Long Island Lumber Co. v. Martin, 15 N.Y. 2d 380, 382-83, 207 N.E. 2d 190, 259 N.Y.S. 2d 142 (1965). See International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 691-92 (1963).

Bressette v. International Talc Co., No. 75-7304 (2d Cir. December 23, 1975) at 1242; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. ITT, 508 F.2d 1309, 1313 (8th Cir. 1975); Oil, Chemical & Atomic Workers Local 7-210 v. American Maize Products Co., 492 F.2d 409 (7th Cir.), cert. denied, 417 U.S. 969 (1974); Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 184 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963), unless the parties have expressly agreed that the issue of whether the arbitration agreement has terminated is itself to be arbitrated, see, e.g., Local Union No. 4, IBEW v. Radio Thirteen-Eighty, Inc., 469 F.2d 610 (8th Cir. 1972); Burt Building Materials Corp. v. Local 1205, IBT, 18 N.Y.2d 556, 223 N.E. 2d 894, 277 N.Y.S.2d 399 (1966). There is no presumption even in collective bargaining cases, that parties have agreed that the arbitrator not the courts, shall determine whether there is an agreement to arbitrate. United Steel Workers of America v. Warrior & Gulf Navigation, 363 U.S. 574, 583, n. 7 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 571 (1960); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, supra, p. 30; Oil, Chemical and Atomic Workers Local 7-210, supra; Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753, 422 F.3d 546, 550 (7th Cir. 1970). Clearly, there is no such agreement here, and the question of whether agreement to arbitrate was or was not terminated was a question for the Court. Indeed, the defendants do not now appear to dispute that proposition.

A. The District Court Correctly Found that the Arbitration Agreement Terminates Upon "Discharge for Cause" - It Does Not Provide For Arbitration As to Whether a Particular Discharge for Cause Terminates the Prior Right to Bid for A Flight Engineer Position

The agreement to arbitrate as signed is not an agreement to arbitrate any and all disputes arising under the individual agreement*; it is a limited agreement to arbitrate claims that TWA has taken, or threatens action, depriving a Flight Engineer of his prior right, as gainst flight crew members other than Flight Engineers, to bid for and occupy the Flight Engineer position (JX 7, ¶ 1, 5, A-49, 50). The agreement provides that the agreement itself "shall continue in full force and effect until Flight Engineer's retirement, voluntary resignation or discharge for cause".

In using the phrase "discharge for cause", the parties were using language commonly used and well understood by them, and which warranted and received no special discussion (PTO ¶9, A-17, 18) (Op. 12, A-136-1); it denoted a termination of employment for some failure or fault of the employee justifying such termination. The agreement did not provide for arbitration of whether a particular discharge was "for cause".

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* Such a clause was originally proposed to TWA, and was rejected (see above, p. 13).

Nor did the agreement to arbitrate cover a dispute as to whether a discharge for cause terminated the individual agreement; the agreement itself specifically recited that it did.

The draftsmen of the individual agreement knew how to draft agreements conferring broad arbitral authority. The Letter Agreement entered into between TWA and FEIA in November 21, 1962, provided for reference to the System Board, including a permanently appointed neutral, of "any dispute. . . in connection with the construction, interpretation, application or performance of" the Crew Complement Agreement. No such general commitment to arbitrate was included in the individual agreement.*

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* In support of their contention that the parties intended that any dispute as to the individual agreement, including a dispute as to whether it had terminated should be subject to arbitration, defendants quote (D. Br. 16) a statement by Crombie that the reasons for the "'separate agreement as to the resolution of disputes under the crew complement agreement'" was "'that, if disputes arose between an individual flight engineer and the company relating to the crew complement issues, they would be referred to Dr. Feinsinger rather than to the System Board.' David Crombie, Vice President, TWA." That statement (Tr. 49-50, A-114-116) did not refer to the rights to arbitrate granted by the individual agreement, but to the "separate" November 21, 1962 agreement between TWA and FEIA, which provided that disputes arising out of the Crew Complement Agreement would go directly to a System Board on which Prof. Feinsinger was appointed as a permanent neutral member, rather than to the regular System Board, where an ad hoc Neutral Referee would be designated in case of deadlock.

As the District Court noted, the defendants argued that "'if the Individual Agreement had not stated that it terminated upon his discharge, each of the defendants would undoubtedly have been before the individual arbitrator to decide whether a prior right was violated under the Individual Agreement by his discharge and replacement by a pilot (Memorandum on behalf of Defendants, pp. 14-15)'" (Op. 11, A-136). Of course, the individual agreement did state that it terminated upon discharge, and accordingly the District Court concluded that "the parties did not agree to arbitrate a claim that a Flight Engineer's discharge for cause was a denial of his 'prior right' to a Flight Engineer position." (Op. 11, A-136K.) Following the same reasoning, most of the defendants took their grievances to the System Board, and did not make their claims under the individual agreements for as much as one to two years after their discharges (see above, pp. 20-22)

The District Court was eminently correct, we submit, in holding that since the agreement specifically recited that it shall terminate upon discharge for cause, the parties cannot be understood to have agreed to arbitrate, as defendants claim, whether a discharge for cause terminates the agreement.

B. The Right to Arbitrate Ended with the Discharge for Cause

The words of the individual agreement are clear enough -- the agreement terminates on "discharge for cause". The defendants go to elaborate lengths (D.Br. 18-24) to suggest that those words do not mean what they say -- to the point of designating the draftsmen as "clumsy lawyers"* (D.Br. 29); they assert that what was intended was that the "prior rights" guaranteed by the Agreement might terminate on discharge, but not the Agreement itself. From this the defendants argue that the right to arbitrate a claim of violation of "prior rights" was not to end with a discharge for cause, even though "entitlement" to the prior right is terminated (D.Br. 19). It would be difficult, we submit, to construct a less persuasive argument for ignoring the plain words of an agreement -- the agreement containing the arbitration clause recites that it terminates upon discharge for cause, and those words assuredly were not intended to mean that the substantive rights created by the agreement were to die upon discharge for cause, but that the special arbitration procedure for enforcing those now extinguished rights was to survive nevertheless.

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* The objects of this criticism are (i) Mr. Asher W. Schwartz, defendants' able and experienced counsel in this case, and (ii) the late Jesse Freidin who before his "clumsy" drafting in this case, managed to serve with distinction as, among other things, General Counsel and Public Member of the War Labor Board.

Confusing the Individual Agreement with a collective bargaining agreement, defendants state that "it takes no citation of authority to establish that the right to demand arbitration of a claim that a discharge was without just cause always survives the discharge" (D.Br. 27). Normally, of course, the agreement to arbitrate under a collective bargaining contract survives the discharge of a particular employee. The collective bargaining agreement is entered into for a fixed term, and is unaffected by the employment status of a particular employee. Typically, it expressly provides for the arbitration of discharge disputes. However, even under a collective bargaining agreement no right to arbitrate survives the termination of the agreement, unless the parties have expressly agreed that it shall. International Association of Machinists and Aerospace Workers, Local Lodge 2639 v. Oxco Brush Division, 517 F.2d 239 (1975); IBT Local 249 v. Kroger, 411 F.2d 1191 (3d Cir. 1969); Procter & Gamble Independent Union of Port Ivory v. Procter & Gamble Mfg. Co., 312 F.2d 181, 186 (2d Cir. 1962), cert. denied 374 U.S. 830 (1963).

None of the cases cited by the defendants supports a contrary result. This Court's statement in Procter & Gamble Independent Union of Port Ivory v. Procter & Gamble Mfg. Co., 312 F.2d 181, 186, quoted out of context at page 28 of defendants' brief holds only that grievances which are based upon conditions arising "during the term of the agreement to arbitrate are arbitrable after that term has expired". By a parity of

reasoning here, the "grievance" does not arise "during the term of the agreement"; the "grievance" arises out of the very event which terminates the agreement. In United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), also cited by defendants, the challenged discharges occurred and the grievances were filed while the collective bargaining agreement was still in effect, see 168 F. Supp. 308, 313 (D.C.W.Va. 1958).* In Potoker v. Brooklyn Eagle, Inc., 2 N.Y. 2d 553, 141 N.E. 2d 841, 161 N.Y.S. 2d (1957), cited in Procter & Gamble Independent Union, supra, the Court held that an employer was bound to arbitrate with respect to severance pay accrued during the term of the contract, but falling due after the contract's termination, because the contract provided both for the arbitration of disputes as to severance pay, and of "all disputes arising out of the contract," and the Court concluded that the parties had agreed to arbitrate with respect to rights accrued during the contract, but claimed after its expiration. See also Monroe Sander Corporation v. Livingston, 377 F.2d 6 (2d Cir. 1967) cert. denied 417 U.S. 969 (1974), where the

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* In Textile Workers Union v. Lincoln Mills of Alabama, 353 US 448 (1957), cited by defendants, in support of their argument that the right to claim arbitration survives the termination of the agreement to arbitrate, the dispute and the filing of a grievance both pre-dated the expiration of the collective bargaining agreement, see 230 F.2d 81, 83 (5th Cir. 1956).

Employer agreed not to move his shop "at any time," and the agreement to arbitrate, which the Court described as "as broad as any imaginable", covered

> "Any controversy, claim or dispute or grievance of any nature whatsoever arising between the Employer and the Union or any employees, including but not being limited to questions of meaning, interpretation, operation, or application of any clause of this agreement, or concerning any breach or threatened breach of this agreement by either party or concerning any acts, conduct or relations of whatsoever nature between the Union and the Employer, directly or indirectly..." (Id. at 10)

By contrast, nothing in the language of the individual agreement, or the circumstances of this case indicates that the parties here agreed to arbitrate the discharge which, by the express language of the agreement, terminates the agreement.

C. There Is No Ambiguity in the Agreement and No Presumption That the Parties Agreed to Arbitrate With Respect to Termination

Defendants argue that if the Agreement fails to provide for arbitration as to whether it has terminated, then it must be deemed to be ambiguous, since the same event may terminate both the substantive "prior right" conferred by the agreement, and the agreement to arbitrate (D.Br. 29). There are, of course, a number of events that could infringe an Engineer's "prior right" to an Engineer position, without terminating the agreement to arbitrate, for example, permitting Senior Pilots

to bid for Flight Engineer assignments on the basis of their Pilot Seniority. It is only with respect to discharge for cause that the prior right and the right to arbitration are terminated by the same event: the Agreement does not provide for arbitration under those circumstances. There is no ambiguity in the contract provision; nor is there any support for the defendants' claim that an asserted ambiguity must be resolved in favor of arbitration in reliance on the "presumption of arbitrability" enunciated in Warrior Gulf (D.Br. 29).

The issue here is the existence of an agreement to arbitrate, not the scope of an agreement to do so. There is no presumption of arbitrability with respect to the expiration or termination of a collectively bargained agreement to arbitrate. International Association of Machinists and Aerospace Workers, Local Lodge 2369 v. Oxco Brush Division, 517 F.2d 239, 243 (1957); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. International Telephone and Telegraph Corp., 508 F.2d 1309, 1313 (1975). Moreover, as we have said, the presumption of arbitrability announced in Warrior Gulf is the child of the national policy favoring arbitration under collective bargaining agreements, containing "sweeping 'standard' arbitration clauses", International Union of Electrical Workers v. General

Electric Company, 407 F.2d 253 (2d Cir.), cert. denied 395 U.S. 904 (1969). It has no application to an individual agreement, granting a limited right of arbitration, outside the established statutory procedures for dispute resolution.

D. The Limited Authority of the Arbitrator Under the Individual Agreement is Designed to Preserve the Exclusive Jurisdiction of the System Board of Adjustment to Finally Adjudicate Discharges

The defendants argue that the question whether discharge for failure to successfully complete Captain training -- a particular cause for discharge -- terminates the "prior rights" to an Engineer's position guaranteed by the individual agreement is a question for the Arbitrator. That might conceivably be so if the individual agreement itself, with its arbitration clause, did not terminate upon discharge. But it does, by its express terms. The reasons the agreement contains those terms and the reasons for the narrowly drawn arbitration language should be sufficiently clear. Specifically, the parties intended to superimpose a new and special tribunal (an arbitrator under rather unique individual agreements) upon an existing statutory structure, for a special and limited purpose. They limited the new special tribunal accordingly, granting it qualified powers, and preserving to the System

Board its traditional function of reviewing discharges alleged to be for cause.*

Plainly, if the System Board is to be called upon to review discharges for cause, and sustains the discharges, the Board's authority will scarcely be "final" as contemplated by the statute and the collective agreement if the discharged employee can then request the Arbitrator under the individual agreement, in the face of the System Board's decisions, to order him reinstated as a Flight Engineer under his "prior rights" agreement. That, of course, is precisely what the defendants here are attempting to do -- to secure a special arbitration award that discharged employees shall be returned to the very jobs to which the cognizant System Board has ruled they are not entitled. To prevent such incursions

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* RLA §204 provides, in part:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of Sections 201-207 of this Act to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by systems, group, or regional boards of adjustment, under the authority section 3, Title I, of this Act."

on the authority of the System Board, the draftsmen of the individual agreement took care to provide that the agreement and not simply the "prior rights" it guaranteed should terminate upon "discharge for cause". That left the question of whether the employee had been properly discharged in one tribunal only -- the System Board.

E. Thorgeirsson v. TWA-Distinguished

In support of their contention that their right to arbitration survived the determination by the System Board of Adjustment of their claimed rights to return to their Flight Engineer positions, defendants rely on Thorgeirsson v. Trans World Airlines, Inc., 288 F.Supp. 71 (S.D.N.Y. 1968) (D. Br. 35-38), which is inapposite.

Thorgeirsson arose at a time when the Pilots and Flight Engineers were still represented by separate labor organizations, had separate contracts, separate seniority lists and separate System Boards. Thorgeirsson, a "new hire" Flight Engineer (not a beneficiary of Memorandum C, or the signatory of an Individual Agreement), had entered First Officer Training, and had been discharged after failing to complete training. His discharge as a Pilot was upheld by the Pilot System Adjustment Board; he then obtained a determination from the Flight Engineer System Adjustment Board that his Flight Engineer seniority had survived his service and discharge as a Pilot, and that he was

accordingly entitled to reinstatement as an Engineer. The Court held that the Pilots Board determination did not preclude resort to the Flight Engineers Board because the Pilots Board was not "empowered to determine his status as a flight engineer under the TWA-FEIA Agreement." 288 F.Supp. at 76. See also Reed v. National Air Lines, supra.; Brotherhood of Railroad Trainmen v. Smith, 251 F.2d 282, 286-87 (6th Cir.), cert. denied, 356 U.S. 937 (1958).

But the System Adjustment Board to which the defendants here resorted, and to which nine of them specifically presented the question of their right to return to their Flight Engineer positions, even if properly discharged for cause as Pilots, had the very authority which the Thorgeirsson Board lacked -- the authority to adjudicate the defendants' right to employment both as Pilots and as Flight Engineers.

In Thorgeirsson, the Court held that:

> "The determination by the Flight Engineers' Board that Thorgeirsson retained his seniority as a flight engineer and was entitled to reinstatement is final and conclusive; the Court cannot redetermine this issue." (Id at 76).

By the same token, the determination by the System Board of Adjustment with jurisdiction over the rights to reinstatement of both Flight Engineers and Pilots is conclusive, and should not be redetermined either by the District Court or by the arbitrator pursuant to the individual agreement.

F. The District Court's De Novo Finding that the Defendants Were Discharged for Cause Was Supported by Substantial Evidence

The District Court correctly determined that the arbitration agreement terminated on discharge for cause and did not provide for arbitration of a claim that a discharge for cause was a denial of a Flight Engineer's prior right to a flight engineer assignment. (Op. 10, A 136j), see pp. 3-4 above. TWA submits that the District Court should not have gone further, and need not have determined de novo that each of the defendants had been discharged for cause; TWA submits that the determination that their discharges had been for cause was conclusively made through the grievance and adjustment procedures, culminating in most cases by determinations by the cognizant System Board of Adjustment. (JX. 17, E-163 et seq; P.T.O., ¶¶22, 23, 27-30, A-23-28) Nevertheless, if the issue was for the Court, the District Court's finding that defendants were, in fact, discharged for cause, is supported by substantial evidence, and in no event can be deemed to be clearly erroneous. (See, Federal Rules of Civil Procedure, Rule 52(a)).

The parties having stipulated that they had not discussed the meaning of the phrase "discharge for cause" in the negotiations preceding the Crew Complement Agreement and the individual agreement, the Court found that they must have intended it to be one which "is not arbitrary or capricious."

The Court found that

> "In fact, it is the defendants who seek to avoid the consequences of their voluntary acts. They entered training for upgrading to Captain, well aware of their inevitable

> discharge should they be unsuccessful. Having been unsuccessful, they seek to compel arbitration of their discharges. It was TWA's policy to discharge all such unsatisfactory trainees, and this policy was not here applied in a manner which discriminated against defendant Flight Engineers. Defendants voluntarily assumed the risk of discharge and may not now avoid the results. The Court concludes that the defendants were discharged for cause, an event not covered by the arbitration agreement entered into by the parties to this litigation." (Op. 12, 13, A-136-1.m).

Its finding that the defendants were discharged for cause, and not as a subterfuge to avoid the individual agreement, like the decision of the System Board which reached the same conclusion, clearly finds substantial support in the record.

III

THE LANGUAGE OF THE AGREEMENT REFLECTED THE INTENTIONS OF THE PARTIES

Defendants struggle to establish that the agreement does not terminate on "discharge for cause" but admit, in the end, that its words "make it appear" to provide that "retirement, voluntary resignation or discharge for cause" do terminate the agreement, including the agreement to arbitrate. (D.Br. 22). However, they say that the arbitration provision in the individual agreement must be read as surviving discharge for cause in order to be faithful to the Crew Complement Agreement and Memorandum C (D.Br. 22).

The short answer to this argument is that the Crew Complement Agreement and Memorandum C require that an individual agreement be executed covering "prior rights" until the "retirement, resignation or discharge for cause" of the Engineer but do not provide that the individual agreement shall also provide for arbitration (see p. 6 above). The suggestion for an arbitration clause in the individual agreement come from FEIA counsel after the Crew Complement Agreement and Memorandum C had been executed. Since they did not mention or contemplate arbitration, the earlier Crew Complement Agreement and Memorandum C can scarcely provide any light as to how long the obligation to arbitrate under the individual agreement was to continue.

A. There Is No Evidence That The Negotiators of the Crew Complement Agreement and Memorandum C Intended to Provide a Second Forum For Disputes Over Discharge for Cause

Defendants describe the Crew Complement Agreement (D Br 4,5) as "guaranteeing the priority of every A and Al Flight Engineer to the Flight Engineer position on TWA aircraft as against any other flight crew member (meaning pilots) 'at all future times.' (Jt Ex 2, p. 93, App. p. a-41)." They omit, with no indication of elision, the modifying phrase "and until retirement or discharge for cause." The omitted phrase defined the limits of the guarantee contained in Paragraph 1 of the July 21, 1962 Crew Complement Agreement, the limits of Memorandum C and the limits of the individual agreement. Defendants have stipulated that at the time the Crew Complement Agreement and Memorandum C were negotiated there was no discussion of the meaning of the term "discharge for cause"; that at the time Memorandum C was negotiated disputes over discharge for cause were routinely referred to the System Board of Adjustment, and that the reason that Memorandum C provided that TWA would enter into an individual agreement was the possibility, then foreseen, that the organization representing the Flight Engineers would change. The negotiators for TWA and for FEIA each testified that for his part, he understood that no change was intended in the jurisdiction of the System Board. There is no evidence

whatever of "intent and design" (D.Br.17) to remove final determinations as to discharge for cause from the jurisdiction of the System Board, and there is certainly no evidence that Memorandum C committed TWA to do so.

B. The Extrinsic Evidence as to the Individual Agreement, Makes Clear That The Individual Arbitrator Was Not Intended to Have Jurisdiction To Determine Whether An A or Al Engineer Was To Be Discharged or Retained as an Engineer

1. The Statements As To Intention

Counsel for defendants argued in the course of the hearing below (Tr.33, A-98) as is argued here, that TWA and FEIA, in negotiating the form of individual agreements, intended that the agreements to arbitrate would survive a discharge for cause under the basic working agreement.

TWA contended that the Court need not explore the intentions of TWA and FEIA in drafting the individual agreement, since the terms of the agreement were sufficiently clear on their face. The Court noted, but reserved decision on, the questions of the competency of certain evidence offered with respect to the intent of negotiators. (Tr.16,28, A-81,93) In the end, agreeing with TWA, the Court concluded that the agreements themselves made clear that all of their provisions, including the provision for arbitration, terminated on discharge for cause (Op. 10,11 A-136 j,k) and made no rulings as to the admissibility

of the proffered evidence. However, none of that evidence, consisting of statements by both TWA and FEIA representatives, (see supra pp. 12a-b) suggests that the negotiators intended, let alone agreed to substitute arbitration under the individual agreements for the procedures which existed for resolving disputes over discharges.

The testimony with respect to the intentions of the parties vis-a-vis the jurisdiction of the System Board over Flight Engineer discharges for cause, and the glaring absence of any provision in the individual agreements for any deviation from the undisputed, customary practice, can only be evidence that no deviation was intended.

2. The "Failure" That Didn't Happen

In attempting to avoid the difficulties provided by the fact that the individual agreement does not say that the arbitration clause survives after a discharge for cause, but simply provides that the agreement as a whole terminates upon discharge for cause, defendants' attorney, himself one of its authors, argued* that the omission of language confirming the right to arbitrate after discharge was the result of a failure to anticipate the question. He said:

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* Since he was not and could not be a witness, he did not testify. Mr. Freidin, representing TWA, and one of Mr. Schwartz's co-authors, was deceased.

> "I must confess to you that we failed in a sense, Mr. Freidin and I, to anticipate this possible thing. We said that the agreement to arbitrate would terminate upon discharge. We failed to say what would happen if there were a discharge with respect to the agreement to arbitrate. (Tr. 34, A-99) (emphasis added).

That argument contained admissions which admit away defendants' case. For if, as defendants argue, the negotiators failed to "say" that the agreement to arbitrate survived discharge or resignation, and failed to anticipate that such a question could arise, the fact would nevertheless remain that they did not affirmatively agree to arbitrate under those conditions. Defendants' best argument appears to be that an agreement to arbitrate after discharge was omitted from the individual agreement by mistake. The operative fact, however, is that there was no such agreement.

As against the defendants' non-evidential argument as to intent, TWA offered evidence that, for its part, there was no intention of submitting to the arbitrator under the individual agreement the right to review the propriety of the discharge which, under the individual agreement, terminated his authority (see supra pp. 12a-b). Moreover, a copy of an early draft of the individual agreement (PX 1, E 221), admissible if resort is to be

had to extrinsic evidence,* establishes that FEIA proposed arbitration of "any dispute relating to the application or interpretation of this agreement." (PX 1, E-224-25)** That proposal would have given a

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* Where the intent of parties to a written contract does not clearly appear from the words of the instrument, the trial court should look to the negotiations leading up to the execution of the contract and other circumstances surrounding the execution to determine the issue of intent. See Eastern Electric, Inc. v. Seeberg Corp., 427 F.2d 23, 26-27 (2d Cir. 1970) (evidence regarding prior drafts of agreement properly admitted into evidence).

** Plaintiff's Exhibit 1 was a photographic copy together with a proposed draft of the individual agreement, from FEIA's attorney (defendants' attorney in this case) to Mr. David Crombie, TWA's Vice President, Labor Relations. Defendants' counsel objected to admission of the copy which did not bear its author's (his own) signature (Tr.6, A-71). Defendants' counsel made no claim that the profferred copy was not authentic. The parties agreed that a diligent but fruitless search had been made for the original (Tr. 7, 10, 72, 75) and the Court reserved decision (Tr. 11, A-76). Under the "best evidence" rule, the offered evidence is admissible in the absence of the original documents. See Denson v. United States, 424 F.2d 329, 331 (10th Cir. 1970); Tallo v. United States, 344 F.2d 467, 470, (5th Cir. 1964). See also the Federal Rules of Evidence, Public-Law 93-595, signed January 2, 1975, effective July 1, 1975, as follows:

> "Rule 1003. Admission of Duplicates
>
> "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."
>
> Under Rule 1001(4) a duplicate is
>
> "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures or by mechanical or electronic recordings, or by chemical reproductions, or by other equivalent techniques which accurately reproduces the original."

discharged Engineer an option as to the forum to which he could appeal the issue of whether a discharge for cause as a Pilot terminated his right to bid for and return to a Flight Engineer position. But that proposal was not accepted by TWA (PX 2, E-228, 230-31); and the agreement in its final form reflects the understanding testified to by TWA's negotiator David Crombie "that the arbitrator named in the individual agreement would not determine whether there was just cause for discharge of an engineer covered by the agreement" (Tr.17, A-82).

Resort to extrinsic evidence, arguably admissible because of an alleged ambiguity in the Agreement, (D. Br.22) establishes that there was no ambiguity at all. Certainly, the language of the individual agreement reflects precisely what TWA intended and understood was to be the protection afforded to the A and A1 Engineers. If FEIA, with its fears of eventual replacement by ALPA, intended to provide an additional forum for determinations with respect to discharge for cause, it either failed

to make that intention known to TWA (see Mr. Schwartz' "confession of failure"), in which case there was certainly no agreement on a second forum, or it failed to secure from TWA its agreement to depart from the statutorily mandated procedures for dealing with discharges for cause (see Plaintiff's Exhibit 1.) The true burden of defendants' complaint is that the agreement as drafted and agreed to by FEIA, and as signed by each individual defendant, did not provide the Engineer with a second forum to which he could appeal his discharge for cause.

IV

EVEN ASSUMING AN EXISTING AGREEMENT TO ARBITRATE, DEFENDANTS' ARBITRATION CLAIMS ARE BARRED BY LACHES

In support of its petition for a permanent stay of arbitration, TWA argued to the Court below that even assuming an existing agreement to arbitrate, defendants' arbitration claims were barred by laches. Although the Court found it unnecessary to reach this argument, the equitable doctrine of laches as applied to the facts of this case is sufficient to support the decision of the Court below.

A. The Question of Laches is for the Court

Little response is required to defendants' claim that the issue of laches is for decision by the arbitrator. Defendants have cited ~~sixteen~~ thirteen cases which purportedly support their position, but all of them were decided prior to the Supreme Court's critical decision in International Union of Operating Eng'rs v. Flair Builders, Inc., 406 U.S. 487 (1972), and few of them are addressed to the arbitrability of laches.

The issues of laches is extrinsic to the contract under which arbitration is sought, and is for decision by an arbitrator only under an agreement to arbitrate so broad that it may be read to include even matters "extrinsic" to the arbitral process.

International Union of Operating Eng'rs v. Flair Builders, Inc., 406 U.S. 487, 491-92 (1972). In Flair Builders, the Supreme Court stated that once a court finds that the parties have agreed to an arbitration claim so broad that it covers

> "'any difference' between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement. Compare: Iowa Beef Packers v. Thompson, 405 U.S. 228, 92 S. Ct. 859, 31 L.Ed. 2d 165 (1972). [*] Having agreed to the broad clause, the company is obliged to submit its laches defense, even if 'extrinsic' to the arbitral process."

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), like most of the cases cited by defendants, did not deal with laches, but with the issue, not raised here, of whether the contractually prescribed procedures for arbitration had been followed. All of the other cited cases, with the single exception of Tobacco Workers v. Lorillard Corp., 448 F.2d 949 (4th Cir. 1971), contained broad arbitration clauses, and are consistent with the Supreme Court's reasoning in Flair Builders that where the parties have agreed to remit to arbitration all differences or disputes arising between them, their agreement to arbitrate covers the question of whether the party seeking arbitration has been guilty of laches in pursuing his claim.

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[*] In Iowa Beef, the Court held that a union's claim that the company had breached the Fair Labor Standards Act by its lunch rules was not arbitrable under an arbitration agreement covering only claims of violation of the contract.

In Local 198, United Rubber, Cork, Linoleum & Plastic Workers v. Interco, Inc., 415 F.2d 1208 (8th Cir. 1969), the Court assumed, without deciding, that it had jurisdiction to decide the issue of laches where the contract provided for arbitration of "any matters covered by this agreement."

In Lorillard, supra, in remitting the issue of laches to arbitration, the Court relied heavily on the presumption of arbitrability that attaches to disputes arising in connection with collective bargaining agreements fixing rates of pay, rules and working conditions. That presumption does not attach to arbitration under the Individual Agreements (see above, pp. 26-28)

TWA rejected a proposal to arbitrate "any dispute" arising in connection with the individual agreement, and agreed to a very limited arbitration provision (see above, p. 13). The restricted agreement to arbitrate to which TWA did agree affords no basis for finding that the parties contracted to present to an arbitrator the "extrinsic" issue of laches. See, e.g., Chattanooga Mailers Union, Local 92 v. Chattanooga News Free-Press Co., 524 F. 2d, 1305, 1313 (6th Cir. 1975). That decision was for the Court.

B. The defendants' unreasonable and inexcusable delay in demanding arbitration constitutes laches and bars their claims.

(1) The defendants' delay was unreasonably long. Under the terms of the defendants' individual agreements, the right

to file an "objection" with TWA and to seek arbitration if dissatisfied with TWA's reponse, first accrued at the time of a claimed "threat" by TWA to take action which denied or would, immediately or in the future, have directly resulted in the denial of the Flight Engineer's "prior rights" to bid for and occupy the Flight Engineer's position on TWA aircraft (JX 7, A-50). The threat of such an alleged "violation of prior rights" -- or more accurately, TWA's position that its "up or out" policy(even-handedly applied by TWA to all First Officers) also applied to A and A1 Flight Engineers who had become First Officers and who chose to enter Captain training -- was brought to the attention of each defendant years before the first request to arbitrate (PTO ¶¶18, 19, A-20,21).

(2) The defendants were fully aware of TWA's position. We need not repeat the details of the defendants' awareness of TWA's position (see supra, pp. 18-20). Clearly they knew of it as early as 1966 or 1967 (PTO ¶17, A-18), but none of them claimed a right to arbitrate before entering training. Edwards, the first of the Flight Engineers to be discharged and to be refused a return to his Flight Engineer position waited a full two years before laying claim to arbitration under the individual agreement (PTO ¶20, A-22; PTO ¶24, A-24). The decision by the System Board upholding TWA's denial of Edwards' grievance was

rendered before 14 of the 19 defendants had even entered Captain training (PTO ¶20, A-22; PTO ¶23, A-24).

After their termination, eight of the defendants filed bids for Flight Engineer positions which were rejected by TWA (PTO ¶21, A-22); sixteen of the defendants filed grievances under the applicable working agreement (PTO ¶22, A-23). Not one of them made a demand for arbitration under the individual agreement until June 1971, years after the question of whether their prior right survived discharge for cause had arisen -- if indeed there was any question -- and after the System Board procedures had been invoked by the final group of defendants (JX 17, A-168).

C. The defendants' delay in raising their claims has prejudiced TWA.

Defendants' years delay in requesting arbitration of their claims that discharge following failure in Captain training violated "prior rights" clearly will have prejudiced TWA if defendants' construction of their "prior rights" agreement were to be considered and sustained by the arbitrator. Compare Sanders v. Air Line Pilots Ass'n, 361 F. Supp. 670, 679 (S.D.N.Y. 1973) in which the Court found "untimely" the claims of Flight Engineers of Slick Airways who had waited three years to challenge certain arbitration awards as violative of rights given to them by an

earlier contract.

It has long been settled TWA policy to discharge First Officers who fail Captain training (PTO ¶19, A-22). TWA believed -- correctly, as the record shows (PTO ¶18, A-21, 22) -- that all the defendants were aware of this policy and knew that TWA would apply it to them as well. Had the defendants sought arbitration, in a timely fashion, of their present claims that a discharge for failure to complete Captain training did not terminate their "prior rights" to bid for Flight Engineer assignments, and had they succeeded in establishing their position in arbitration, TWA would, of course, have abided by such an arbitral decision and would not have discharged defendants as TWA employees. Alternatively, had the defendants timely asserted the claims they presently seek to arbitrate, TWA might have exercised the discretion it had under the ALPA Crew Complement Agreement (JX 8, ¶C A-64, 65) to suspend the program of providing First Officer (and thereafter Captain) training to A and A1 Flight Engineers until resolution of the claim that the application of its long-standing policy to such employees would violate the individual agreements. This entire dispute could have been resolved before defendants became First Officers, before they were offered or accepted into Captain training and before TWA expended large sums of money in an unsuccessful effort to train them. Moreover, TWA would not now be subject to substantial potential liability arising out of

discharges effected pursuant to an established policy, of which the defendants were well aware, and the rights of other employees who occupy Flight Engineer positions would not be subject to potential disruption.

Defendants' demand for arbitration under the individual agreements came only as a last resort -- one could say only as an afterthought. Their laches in pursuing their claims was indefensible and bars their claim to arbitration; see Reed v. National Air Lines, 524 F. 2d at 460, n. 3;* Amalgamated Clothing Workers v. Ironall Factories Co., 386 F.2d 586, 591-92 (6th Cir. 1967).

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* The elements of prejudice were spelled out by the Court in Reed v. National Airlines, with respect to the failure of the plaintiffs to assert their claimed rights to Flight Engineer training:

> "...it was not until their attempted intervention in the NAL-IAM suit in December, 1971 that they first asserted their claims. Meanwhile, the interests of the flight engineers senior to the plaintiffs and NAL's interest in maintaining morale, resolving disputes in their incipiency, and minimizing wage claims amounted to substantial prejudice." Id. at 460, n. 3.

Conclusion

The Judgment Should Be Affirmed.

Dated: New York, New York
March 4, 1976

Respectfully submitted,

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